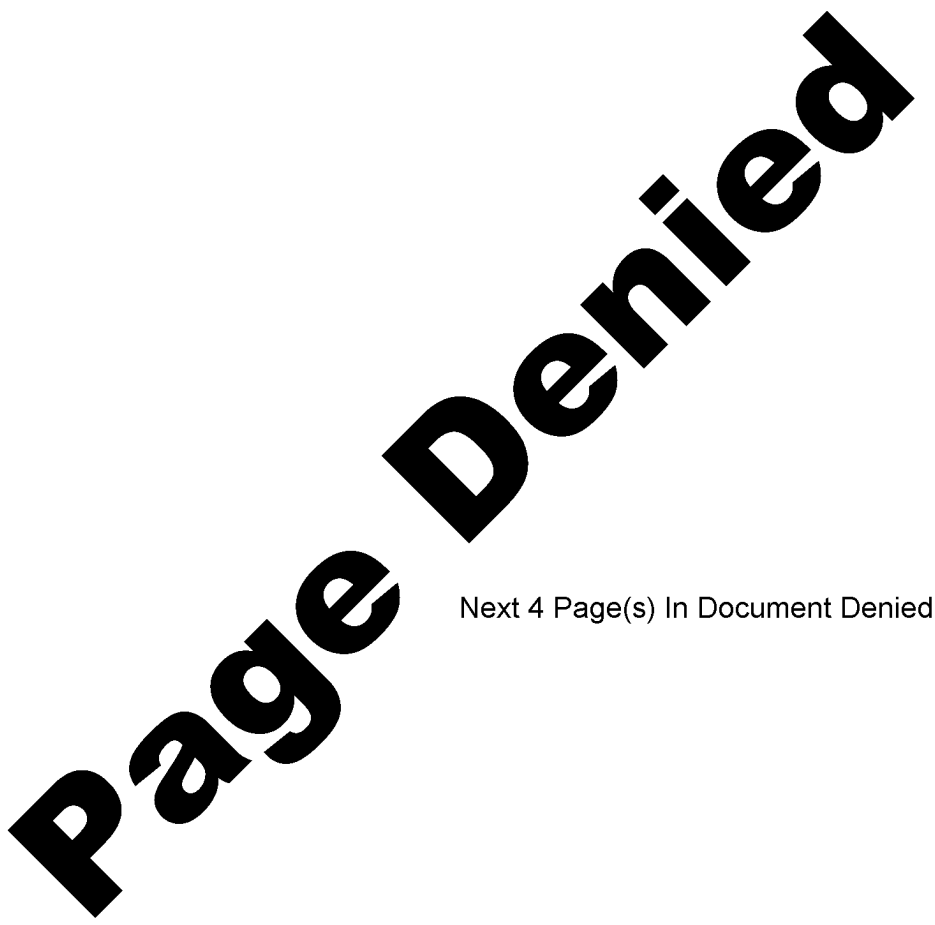

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TESTIMONY OF DAVID P. DOHERTY, GENERAL COUNSEL
CENTRAL INTELLIGENCE AGENCY, BEFORE HPSCI
WEDNESDAY, 8 APRIL 1987

Mr. Chairman, I am here today to comment on H.R. 1013, the "Intelligence Oversight Amendments of 1987." This bill would amend section 662 of the Foreign Assistance Act of 1961, known as the "Hughes-Ryan Amendment," and section 501 of the National Security Act of 1947, the Intelligence Oversight Act. I have heard it said that the proposed legislation does no more than reflect the status quo or, in any event, reflect the basic agreements between the Executive Branch and the intelligence committees on how covert action activities are to be reported. I believe, however, that the legislation does much more than that.

Before I comment specifically on the bill, I would like to address very briefly the law as it stands today. The current laws reflect a compromise between the Executive and Legislative Branches regarding the exercise of their respective constitutional authorities and responsibilities. I am not here to address the extent of those authorities and responsibilities, but would point out that the drafters of the

existing oversight legislation recognized that "such constitutional authorities and duties of the branches may sometimes come into conflict with one another." [Senate Report] Section 501, "does not prescribe hard and fast requirements for what may be a gray area resulting from the overlap between the constitutional authorities and duties of the branches." Congressman Boland, then-Chairman of the House Intelligence Committee, recognized that prior notice might not be given, but stated: "The conference report neither asserts nor denies a constitutional right to withhold notice. Rather, it recognizes that there exist authorities and duties for both executive and legislative branches of the Government and, most importantly, it leaves the Constitution as it finds it." We should do the same.

There is a significant amount that we can say about what the law now requires. First, heads of intelligence agencies must keep the two intelligence committees fully and currently informed of intelligence activities of the U.S. Government under their cognizance, including significant anticipated intelligence activities. Such activities include covert action operations and certain collection and counterintelligence activities. An activity is considered significant, for example, if it would be particularly costly or have significant

potential for affecting this country's diplomatic, political or military relations with other countries or groups. The day-to-day implementation of previously adopted policies or programs would not be included as a matter of course.

Although there has been considerable discussion during the last several months over the President's decision not to provide advance notice of the Iran operation, there has been considerable confusion over the legal implications of that initial decision. Some have stated incorrectly that the decision not to report in advance was a violation of the law. That is simply not the case, and the legislative history makes that clear. Without going into great detail about the extent of the President's authorities to withhold prior notice, I simply wish to point out that section 501(b) recognizes that there may be some instances in which the President would not provide advance notice of an operation, and that in those cases the committees would be expected to receive "timely notice" of covert action operations and a reason for the decision not to inform Congress. Obviously, there can be room for considerable disagreement over what this provision requires, and apparently there is. The law represents a presumption that prior notice will be given. If advance notice is not given, the relationship between Congress and the Executive is

jeopardized. However, I hope these matters can be worked out in what the conference language calls "a spirit of comity and mutual understanding."

The issue of prior notice is a complex one, but there are other portions of the bill that are somewhat less complex and not so controversial. The law recognizes that there is a shared responsibility for the protection of sensitive intelligence information. The law also provides that the committees shall be provided reports on illegal activities or significant intelligence failures. Finally, the law provides that the provision of information shall be with due regard for the protection of intelligence sources and methods. My experience in this area leads me to conclude that there is a fair consensus between this committee and the CIA over how the oversight responsibilities of the committee can be accommodated while continuing to enable CIA to protect the very sensitive sources and methods of its intelligence operations. Mr. Gries has provided [will provide] a statement on how the process actually works. Although the oversight relationship is not without its difficulties, I think you will agree that on the whole it works well. This leads me to conclude, however, that there is no need to amend the current law in a way that could be seen as a dramatic departure that increases, rather than

diminishes, the inherent tensions between the Executive and Legislative Branches. I believe the proposal does this, not because it would necessarily make the conduct of intelligence activities impossible, but because, as an attorney, I believe this proposed legislation attempts to tip the constitutional balance.

H.R. 1013, itself, has four major elements: the requirement for written Findings; the provision of copies to this committee and others; the elimination of the preamble; and the limitation on the ability to defer notice. I will address each of these separately.

First, the bill would provide a statutory requirement that Findings be in writing. Currently, there is no legal requirement for written Findings, although Executive Branch policy provides that the President "shall approve all covert action Findings in writing." In practice, this is what has occurred. Findings are prepared by CIA and submitted to the National Security Council staff for review and coordination. The Findings are approved by the President in writing. I suppose it is a question for the White House to address whether, as a practical matter, a Finding can be prepared in writing in extraordinary circumstances where time is of the essence, for example, to save life and limb. This point can be

debated back and forth with some saying that it does not take very long to write out something as important as a Presidential determination. On the other hand, I believe there is room to argue that there should be retained some flexibility for oral Findings, with written records of decisions being made afterwards to ensure that there is a common understanding of what has been approved.

The bill also provides that actual copies of the Findings must be submitted to the Senate and House Intelligence Committees, the Vice President, the Secretaries of State and Defense, and the Director of Central Intelligence prior to the initiation of the covert action operation. Under current practice, the intelligence committees receive the full text, although not the actual copies, of the Findings. However, the committees are provided the opportunity to review the copies under controlled circumstances. The Secretaries of State and Defense receive copies of the Findings without the Presidential signature appearing on the document. The Director of Central Intelligence is provided a copy that contains the actual signature.

Much has been made in recent months about the decision not to send a copy of the Iran Finding outside the White House. Frankly, I am somewhat surprised over the furor because this

Agency, although it did not possess a copy, had ready access to the original. Indeed, several officials from CIA were shown the Finding within a few days after it was signed. Moreover, on subsequent occasions, CIA officials were provided access upon request to ensure their understanding of the authorized activities. I know that security may be an issue if copies of Presidential Findings are given wider dissemination. It is one thing if the substance of a Finding leaks. It is quite another if a document with the President's signature appears on the front page. Moreover, I expect the Attorney General may have some legal issues to address with respect to the release of Presidential documents.

Third, the proposed legislation would eliminate the preamble to the current oversight law which requires that reporting to Congress be consistent with "all applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches of the Government." As I have stated, this language reflects a compromise and, although there is some question about the extent of these authorities, it is clear that in past years the Executive and Legislative Branches, in approving this language, have thought it best to agree to disagree. There are several points that must be made about the implementation of the

current oversight provision. First, the statute does recognize that constitutional authorities are at stake. The statute also provides that reporting shall be with due regard for the protection of sources and methods, a clear recognition of the sensitivity of the information involved. Third, in practice, very little information is not provided to the oversight committees. In my view and, I believe the Department of Justice has made this point to you as well, removal of the preambular language by statute cannot, as a matter of law, amend the President's authorities under the Constitution. Nevertheless, the absence of such language would, in my view, serve to shift the burden of showing that a decision not to report an activity, or to delay reporting, was lawful. As a practical matter, this could very well foreclose the exercise of the President's constitutional prerogatives. I believe this would be unnecessary, unwise, and unacceptable to this Administration.

The final effect of this legislation would permit, in "extraordinary circumstances affecting the vital interests of the United States, and only when time is of the essence," deferral of notice of an activity for up to 48 hours after the initiation of such an activity or the signing of a Finding. This provision does two things. It says that, however

important the President might believe withholding notice might be, he may do so for no more than 48 hours. Secondly, this applies both to withholding of notice with respect to covert action operations and with respect other significant anticipated intelligence activities. Thus, no longer would notice of covert action operations be provided on an undefined timely basis. Now, "timely" is defined as within 48 hours. Moreover, whereas the current legislation provides that timely notice need be given only with respect to covert action, the proposed bill would give a 48-hour requirement for all significant activities. I defer to the Attorney General, but question the constitutionality of that requirement, particularly where the activity involves solely intelligence collection rather than operations of a foreign policy nature.

Under current practice, each proposed operation is reviewed on its own merits. Indeed, a decision to withhold prior notice from the committees is an extraordinary event. CIA does notify the committees within 48 hours of its receipt of the Finding. However, there may be situations where 48 hours would be considered by the President to be insufficient leeway. It is the extraordinary collection operation that can be accomplished in that time. Again, without commenting upon whether CIA could or could not live with such a provision, I would note that as a

lawyer this proposal would appear to affect the authority and responsibility of the President. I do agree that decisions to limit or withhold notice should be reviewed and reevaluated periodically, and a record made of the decision and basis. Moreover, perhaps greater use of the existing limited notice provision could be made so that, instead of totally withholding notice, we could be more sensitive to the need to provide some notice to the designated members of Congress. Given the new mandate of the NSC staff and the charge of the President to review these areas within this month, it seems to me inappropriate to make a recommendation at this time on how to proceed until we have studied the matter more fully.

I would note in closing, however, that there are two statements made on earlier occasions that seem particularly relevant here. First, at the time the current legislation was being considered in 1980, prior notice had been given for operations consistently over the previous four years, with only one isolated, extraordinary exception. In the past six years, we have, once again, had one isolated, extraordinary exception. I think it is fair to say, without making any judgment on the decision not to inform Congress, that this was an aberration. Second, I wish to note that in 1983, when Congress was considering amendments to the oversight process,

former DCI William Colby stated that his recommendation "is not to try to cross every 't' and dot every 'i' in the oversight process. The major change in the relationship between the Congress and the Executive as a result of the CIA investigations in the mid-1970s has brought our management of intelligence into full compliance with our congressional system." I think, based upon what Mr. Gries is saying today, that there can be no doubt that the oversight process is working. That is not to say that there are not problems and that is not to say that the committees do not on occasion seek more information than the Agency wishes to provide. As the Tower Board noted, "there is a natural tension between the desire for secrecy and the need to consult Congress on covert operations." In my view, that tension has always existed, and I do not believe that the proposal, however well intentioned, will reduce that tension.